

June 1987

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### Recommended Citation

Laurence E. Gold, *The Capricious Lure of Labor Law Regulation*, 89 W. Va. L. Rev. (1987).  
Available at: <https://researchrepository.wvu.edu/wvlr/vol89/iss4/3>

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## THE CAPRICIOUS LURE OF LABOR LAW REGULATION

LAURENCE E. GOLD\*

United Mine Workers President Richard L. Trumka has ample reason to be frustrated and cynical. Despite a half-century of federalized labor-management relations law, most American employers remain fundamentally hostile to the trade union movement, and the public is deeply ambivalent. Alone perhaps of all the New Deal legislation and programs, worker organizing rights often seem to rest on but a fragile consensus. And, since the enactment of the original National Labor Relations Act (NLRA)<sup>1</sup> in 1935, business and conservative interests have succeeded in weakening the law statutorily through the enactment of counter-legislation in 1947<sup>2</sup> and 1959,<sup>3</sup> and administratively through the cyclical political process, most recently and radically by the Reagan Administration's reshaping of the National Labor Relations Board (NLRB). Nonetheless, I doubt that Mr. Trumka's prescription—federal deregulation of labor-management conflict—will help unions or workers.

Mr. Trumka urges elimination of the pillars of federal private sector labor law—the Wagner Act, the Taft-Hartley Act, and the Landrum-Griffin Act (and, presumably, the Norris-LaGuardia Act of 1932,<sup>4</sup> the Railway Labor Act of 1926,<sup>5</sup> and the labor relations provisions of the Postal Reorganization Act of 1970)<sup>6</sup> because, in his words, “labor law has become a dangerous farce,”<sup>7</sup> operating not to advance industrial democracy but to foil workers' rights. I have little quarrel with Mr. Trumka's recitation of legal ills and social realities. But the law's limitations have been known for decades, and unions now face problems of survival greater than at any time since labor law was federalized. Is deregulation an ap-

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<sup>1</sup> National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1982)).

<sup>2</sup> Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-97 (1982)).

<sup>3</sup> Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, 73 Stat. 419 (1959) (codified as amended at 29 U.S.C. §§ 401-531 (1982)).

<sup>4</sup> Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932), (codified as amended at 29 U.S.C. §§ 101-15 (1982)).

<sup>5</sup> Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-88 (1982)).

<sup>6</sup> Postal Reorganization Act, ch. 12, 84 Stat. 733 (1970) (codified as amended at 39 U.S.C. §§ 1201-09 (1982 and Supp. III 1985)).

<sup>7</sup> Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871 (1987).

propriate legal course that can spur the labor movement to renewed growth and clout?

When the United States Supreme Court upheld the constitutionality of the Wagner Act in 1937, it recognized that "a single employee [is] helpless in dealing with an employer," and collective action is therefore "essential to give laborers opportunity to deal on an equality with their employer."<sup>8</sup> This observation is no less true today. Employers enjoy a marked advantage of power over their employees. The largest international unions are simply dwarfed by the multinational conglomerates and financial giants that direct the allocation of capital within and without the United States. Employers almost always resist encroachments on their prerogatives and the outer-directed diversion of their resources. Because both are necessary byproducts of unionism, it is the rare employer that agrees to recognize a union upon its employees' request. Meanwhile, as is now widely recognized, the economy is enduring a major shift from its private industrial and manufacturing base to service and information industries. Proportionately more workers in the latter fields are unorganized and work for compensation inferior to that enjoyed by unionized production workers. And unions themselves have not yet recovered from the debilitating public obloquy fueled by the corruption hearings held during the late 1950s by the Senate Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee).<sup>9</sup>

Notwithstanding the public's distrust of unions as institutions, the public generally appreciates the critical role unions have played in advancing the wages, working conditions, and job security of all workers, and in achieving social welfare and civil rights gains. The challenge for the labor movement today is to organize both those workers employed in the old white collar and traditionally unorganized sectors, such as banking and office workers, and those toiling in the new service and information industries, from fast food servers to high-tech word processing operators. The question Mr. Trumka poses is whether or not unions can and should meet this challenge in a future governed by the current federal legal framework.

It must first be acknowledged that this is largely an academic exercise; the wholesale deregulation of labor-management conflict is a terribly remote possibility. Despite labor's frustration with the Reagan NLRB (and the Reagan judiciary—which Mr. Trumka surprisingly omits to mention) neither the AFL-CIO nor any of its member unions actively encourages deregulation or has placed it on its legislative agenda. The calls for repeal voiced at the peak of controversy over the Reagan NLRB in 1984 and 1985 are now rarely heard. Even if the United

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<sup>8</sup> NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

<sup>9</sup> See generally SENATE SELECT COMM. ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, S. REP. NO. 1139, 86th Cong., 2d Sess. (1960); SENATE SELECT COMMITTEE ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, S. REP. NO. 1417, 85th Cong., 2d Sess. (1958).

Mine Workers, which during the past year has indicated a desire to join the AFL-CIO, possibly by merger with an AFL-CIO affiliate, were to place deregulation at the top of its legislative agenda, its lone voice could not make headway in Congress; nor could either of the other two large independent unions—the International Brotherhood of Teamsters and the National Education Association—if either were so inclined.

And what of the business community? Labor-management deregulation is completely absent from its legislative agenda as well—probably because it does not consider that goal attainable. I believe that if business thought that Congress could be convinced to deregulate, it would do everything in its power to achieve it. For employers know that, however favorable the Reagan NLRB has been to them, as suggested below, the legal climate would be far more hospitable to them were the labor statutes erased from the books.

Deregulation, in fact, has been a significant part of the agenda of the NLRB itself in recent years. In key decisions, the Reagan NLRB has abdicated its role as an arbiter of representation election campaign communications by unions and employers;<sup>10</sup> declined to recognize the claims of individual nonunion workers by refusing to characterize their conduct as “concerted activity” entitled to statutory protection;<sup>11</sup> promoted the doctrine favoring deferral by the NLRB to the grievance and arbitration provisions of collective bargaining agreements;<sup>12</sup> eliminated restrictions on a union member’s right to resign his membership;<sup>13</sup> and eschewed asserting jurisdiction in the first instance over various types of workplaces.<sup>14</sup> Most of these decisions clearly undermine unions and worker protections.

Deregulation of labor law is based on different premises depending on who advocates the cause. In Mr. Trumka’s view, it is the failure of federal labor law to facilitate greater protection for workers and greater success by labor in organizing. Even if these goals achieved sufficient support in the electorate and the Congress to bring legislative changes designed to obtain them, it is highly unlikely that such a consensus would lead to deregulation as the solution. Deregulation is more likely to be the cause of employers arguing on the basis of economic efficiency and industrial productivity. No market analysis could credibly posit that employers unfettered by the federal labor laws would compete to grant their workers better organizing and bargaining rights. Rather, deregulation would impel businesses to compete by reducing their labor costs as much as possible, un-

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<sup>10</sup> *Midland Nat’l Life Ins. Co.*, 263 N.L.R.B. 127 (1982).

<sup>11</sup> *Meyers Indus., Inc.*, 268 N.L.R.B. 493 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 106 S. Ct. 313 (1985), *decision after remand*, 281 N.L.R.B. No. 118 (1986).

<sup>12</sup> *United Technologies Corp.*, 268 N.L.R.B. 557 (1984); *Olin Corp.*, 268 N.L.R.B. 573 (1984).

<sup>13</sup> *Machinists Local Lodge 1414*, 270 N.L.R.B. 1330 (1984).

<sup>14</sup> *E.g.*, *Trustee of St. Joseph’s College*, 282 N.L.R.B. No. 9 (1986); *Res-Care, Inc.*, 280 N.L.R.B. No. 78 (1986).

impeded by unionism. As in the pre-Wagner Act era, labor again would be but another commodity with no rights other than those which could be fashioned from common and constitutional law, and no protections other than those afforded by the surviving federal and state statutes which regulate the workplace.

Mr. Trumka perhaps asks too much from our labor laws as they are now written. The world that Albert Gallatin wrote about in 1797 did not exist then, or now. The hope that federal labor law would usher in true industrial and political democracy has been dead for nearly forty years, since Congress savaged the Wagner Act with the Taft-Hartley amendments in 1947. Lest labor focus too much on recent disappointments and setbacks, it is worth noting some of what Congress engrafted on the NLRA via Taft-Hartley: a federally protected right of workers to "refrain" from participating in concerted activities;<sup>15</sup> a broad prohibition against union "restrain[t] or coerc[ion]" of employees in the exercise of their NLRA rights;<sup>16</sup> a prohibition against strikes, threats to strike, and boycotts against employers in aid of certain objectives, including pressuring an employer to cease doing business with another employer (the secondary boycott)<sup>17</sup>, pressuring an employer to assign certain work to employees in a certain union or craft,<sup>18</sup> and a damages remedy for employers when a union violates these prohibitions;<sup>19</sup> a prohibition of "excessive or discriminatory" membership fees, as determined by the NLRB;<sup>20</sup> and a prohibition of NLRB certification of unions which includes both guards and other employees.<sup>21</sup> Taft-Hartley also added procedures by which unions could be decertified<sup>22</sup> or their union security clauses eliminated,<sup>23</sup> stripped from supervisors their enforceable right to organize,<sup>24</sup> authorized states to pass so-called "right-to-work" laws,<sup>25</sup> and rendered strikes by federal employees unlawful.<sup>26</sup> That unions have failed to organize a majority of eligible American workers since 1947 is not so mysterious after all.

As if these changes weren't enough to restore a so-called "balance" in the labor laws—a notion itself antithetical to the Wagner Act's purpose of liberating unions and workers from their legal and practical disadvantages—Congress in 1959 enacted the Landrum-Griffin Act. That statute bolstered Taft-Hartley by

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<sup>15</sup> 29 U.S.C. § 157 (1982).

<sup>16</sup> *Id.* at § 158(b)(1)(A) (1982).

<sup>17</sup> *Id.* at § 158(b)(4)(A) (1982).

<sup>18</sup> *Id.* at § 158(b)(4)(D) (1982).

<sup>19</sup> *Id.* at § 187 (1982).

<sup>20</sup> *Id.* at § 158(b)(5) (1982).

<sup>21</sup> *Id.* at § 159(b) (1982).

<sup>22</sup> *Id.* at § 159(c)(1)(A)(ii) (1982).

<sup>23</sup> *Id.* at § 159(e)(1) (1982).

<sup>24</sup> *Id.* at §§ 152(3), 164(a) (1982).

<sup>25</sup> *Id.* at § 164(b) (1982).

<sup>26</sup> Act of June 23, 1947, ch. 120, 61 Stat. 160, § 305, *repealed by* 69 Stat. 624 (1955) (which was in turn replaced by 80 Stat. 424, 524, 609 (1966)).

strengthening the ban on secondary boycotts to preclude union pressure on the secondary employer itself,<sup>27</sup> and sharply restricting the right to picket for the purpose of forcing employer recognition of a union.<sup>28</sup> Landrum-Griffin also for the first time introduced extensive federal regulation of internal union administration, subjecting unions to an array of litigation by union members and the United States Department of Labor to enforce those new rules.<sup>29</sup>

This recitation renders labor law deregulation tempting indeed. But what would labor-management law be like after deregulation? This question would be worthy of considerable analysis were the proposal to become seriously and widely considered. Some preliminary observations are nonetheless sobering.

In some respects, the changes might not be so dramatic—at least not initially. Conduct which is now expressly permitted by the federal labor laws might remain lawful in the absence of laws distinguishing between permissible and impermissible activity. Thus, for instance, states could still enact or not enact right-to-work laws as they chose; no preemption consideration would put their authority to do so in doubt. Likewise, prehire agreements in the construction industry would still be lawful without requiring the law's blessing as an exception to the NLRA's unfair labor practice scheme.<sup>30</sup> Indeed, prehire agreements would become lawful in every industry. In reality, however, labor might be unable to reach such agreements in the absence of any accepted legal rules. In any event, freedoms that exist only by default are subject to restriction through state or other federal action.

Implicitly recognized by Mr. Trumka, although it is in a critical respect inconsistent with his thesis, is that even in the absence of the pillars of federal labor law, organized labor would be preoccupied with the legal process. It is far too late in the day for unions and management to expect to fight their battles purely on the basis of economic might. If the Labor-Management Relations Act (LMRA) does not set the rules, and there is no National Labor Relations Board to enforce and adjudicate disputes, a new labor law will be fashioned in the state and federal courts. The vacuum will be filled; a litigious culture will not leave labor-management conflict to unrestrained private combat.

One of Mr. Trumka's goals is to take labor out from under the yoke of the Reagan NLRB and its perhaps equally antiunion successors. But on the federal level, unions certainly face, for a much longer period, a federal judiciary dominated by Reagan appointees, including at least two members of the Supreme Court. Because NLRB members serve five-year terms, and one term expires every year,<sup>31</sup> the latest that the Reagan NLRB can possibly retain its majority is 1991.

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<sup>27</sup> 29 U.S.C. § 158(b)(4)(A), (B) (1982).

<sup>28</sup> *Id.* at § 158(b)(7) (1982).

<sup>29</sup> *Id.* at §§ 401-531 (1982).

<sup>30</sup> *Id.* at § 158(f) (1982).

<sup>31</sup> *Id.* at § 153(a) (1982).

But the Reagan judiciary will likely preside into the next century; as a matter of policy, the Reagan Administration seeks youthful judges to ensure that its legacy outlasts it as long as possible. Labor cannot depend on conservative judges to fashion a federal common law of labor relations which would be a beneficial substitute to current regulatory acts.

As for the state courts, they are as much a polyglot as they ever were. In parts of the country historically most resistant to unionism, such as the south and southwest, the federal labor statutes grant legal protections which otherwise would not exist. In their absence, some state legislatures will no doubt enact their own labor-management statutes. Some of these might promote private sector organizing; but many might be modelled on the repealed federal statutes anyway, or be written even more in management's favor. This latter conclusion is not unreasonable given that states today actively attempt to develop favorable business climates to attract new and expanding industries.

If left to an amalgam of conflicting state statutory and common law, union legal expenses and entanglements will necessarily increase. Instead of a consistent, preemptive national system of laws (with, admittedly, some regional variations resulting from conflicting decisions by the federal courts of appeals), there will be fifty different systems of labor law, hobbling, for instance, national and industry-wide bargaining—if there is any—with endless complexity. Union legal costs will also rise because lawyers will become more, not less, necessary. One need not be an attorney to practice before the National Labor Relations Board;<sup>32</sup> but unions will have to use attorneys when their rights are adjudicated instead in state and federal courts.

Nor do state and federal courts necessarily hold the promise of speedier adjudication. True, the NLRB's processes are scandalously slow and the opportunities for appeal often result in paper victories long after an organizing drive has been thwarted by time or an unfair labor practice has wrought irrevocable damage.<sup>33</sup> But many state and local court systems are marked by horrendous delay and inefficiency, guaranteeing no swifter judgment, and federal dockets themselves are more and more crowded. Civil litigation in both systems is subject to glacial discovery and motion practice with even simple cases often taking years to reach decision at the trial court level.

Whether or not a legally enforceable right to form, join, and assist a union would survive labor law deregulation is, in my view, the most important issue.

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<sup>32</sup> 29 C.F.R. §§ 102.38, 102.66(a) (1986).

<sup>33</sup> See, e.g., HOUSE COMM. ON GOVERNMENT OPERATIONS, DELAY, SLOWNESS IN DECISIONMAKING, AND THE CASE BACKLOG AT THE NATIONAL LABOR RELATIONS BOARD, H. R. REP. NO. 1141, 98th Cong., 2d Sess. (1984); HOUSE SUBCOMM. ON LABOR-MANAGEMENT RELATIONS OF THE COMM. ON EDUCATION AND LABOR, THE FAILURE OF LABOR LAW, 2d Sess. (1984) (THE FAILURE OF LABOR LAW).

Perhaps the courts would recognize a common law or constitutional right to organize, enforceable by private civil action; perhaps not. Interestingly, when the Supreme Court upheld the Wagner Act's constitutionality in 1937, it observed:

[T]he statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents.<sup>34</sup>

Legal protection of the right to organize is critical because, as difficult as it is to organize workers under the federal labor statutes, employee fear of employer retaliation is perhaps the principal impediment to union organizing. The discharge of union adherents and other employer unfair labor practices are potent employer weapons in the face of sluggish and weak NLRB remedial processes.<sup>35</sup> If it is an onerous task to overcome the fear and insecurity of workers when they have a federally-protected right to join a union, how much more so will it be to overcome that fear when the law recognizes no such right at all?

Even if workers organize in this brave new world, in the absence of a compulsory government process leading to an enforceable employer obligation to recognize and bargain with a newly organized union, economic coercion would be labor's only weapon unless new legal tools became available. If they do not, then every organizing effort could become a lengthy, debilitating, and costly battle, which employers are generally better equipped to wage than workers living from paycheck to paycheck, and unions with limited funds and personnel to commit to organizing. Even under the current legal scheme, newly NLRB-certified unions fail to achieve a first contract with the employer roughly half the time due to "lawful" and unlawful employer resistance.<sup>36</sup> In the absence of NLRB certification, at what rate could unions achieve both recognition *and* a first contract?

Another result of deregulation would be mortal danger for existing collective bargaining relationships which, after all, cover millions of private sector workers and generate the funds necessary for unions to function. Under current law, an employer's obligation to recognize and bargain with a union does not expire with the termination date of a collective bargaining agreement.<sup>37</sup> Even if an agreement

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<sup>34</sup> *Jones & Laughlin Steel Corp.*, 301 U.S. 1.

<sup>35</sup> See, e.g., Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983); R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* 233-39 (1984).

<sup>36</sup> See, e.g., Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 354 (1984).

<sup>37</sup> *Teamsters Local Union No. 175 v. NLRB*, 788 F.2d 27, 30 (D.C. Cir. 1986).



remained enforceable for its contracted-for duration under the state common law of contracts (for it would no longer be enforceable by private suit under section 301 of the LMRA<sup>38</sup> or by NLRB complaint under sections 8(a)(2) and (5) of the NLRA,<sup>39</sup> what is to prevent an employer from simply terminating the entire collective bargaining relationship when the agreement expires? In some cases, employers may choose to continue to recognize and bargain with a union, preferring stability and structure to employee discontent and labor conflict. But Mr. Trumka is correct that employers remain fundamentally hostile to the trade union movement and most will likely seize the opportunity to strip their workers of their collective voice. Can labor afford years of combat just to maintain the same level of organization as existed on Deregulation Day?

The void left by the repeal of federal labor law could be filled as well by two other tendencies which would likely undermine organized labor. The first is the erosion, already well under way, of the employment-at-will doctrine, as state courts increasingly recognize contractual and public policy exceptions to the non-union employer's historical freedom to discipline and discharge employees and to alter their terms and conditions of employment.<sup>40</sup> Deregulation would likely inspire further erosion of the doctrine as individual employment rights acquire greater significance. Enhancing the rights of nonunion employees is a worthy judicial and legislative goal. But this trend in the law is premised on the individual worker's relationship with the employer, and greater individual rights will never offer more than a pale substitute for collective rights and collective bargaining—as Congress and the Supreme Court recognized half a century ago.

The second possibility is that deregulation would force unions, as a survival tactic, to enter into various forms of "labor-management cooperation." In 1986, the United States Department of Labor issued a legal analysis of this issue which posed the question of whether the federal labor laws were compatible with cooperative arrangements.<sup>41</sup> Deregulation would instantly moot that question. Labor law deregulation may encourage "cooperative" relationships which are, in fact, Faustian bargains made by unions whose practical alternatives have all but disappeared.

More ironies abound. It was labor's very experience with the common law, the labor injunction, and the abuse of such federal enactments as the Sherman Antitrust Act<sup>42</sup> that led to successive federal labor relations legislation, proceeding from the Railway Labor Act in 1926, the Norris-LaGuardia Act in 1932, and the

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<sup>38</sup> 29 U.S.C. § 185(a).

<sup>39</sup> 29 U.S.C. §§ 158(a)(1), (5).

<sup>40</sup> See, e.g., *Individual Rights in the Workplace: The Employment-At-Will Issues*, 16 U. MICH. J. L. REF. 199 (1983).

<sup>41</sup> SCHLOSSBERG & FETTER, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION (1986), reprinted in DAILY LAB. REP. (BNA) No. 116 at D-1 (June 17, 1986).

<sup>42</sup> 15 U.S.C. §§ 1 to -31 (1982 and Supp. II 1984).

National Industrial Recovery Act of 1933,<sup>43</sup> which was the forerunner of the Wagner Act in 1935. Besides statutory recognition and protection of the right to organize, the federal labor statutes provide a host of other rights which, in a world without federal labor law, unions would have to recapture through economic might or alternative legal and legislative activity.

For instance, the Norris-LaGuardia Act precludes federal courts in most circumstances from enjoining strikes and other collective action on the part of workers<sup>44</sup> and renders unenforceable so-called "yellow dog" contracts; that is, contracts imposed upon workers by employers under which the workers promise not to join or remain members of a labor organization.<sup>45</sup> The NLRA creates the federally-protected right to organize free of employer "restrain[t] and coerc[ion],"<sup>46</sup> prohibits the company union,<sup>47</sup> prohibits employer discrimination against workers on the basis of union membership,<sup>48</sup> prohibits employer refusals to bargain in good faith,<sup>49</sup> and confers upon unions the status of exclusive representative of all employees in a bargaining unit, not just of their members.<sup>50</sup> The statute further mandates employer compliance with the outcome of NLRB-conducted elections and the honoring of NLRB certifications of unions as the employees' official bargaining representatives.<sup>51</sup>

These are the core provisions of federal labor law which promote organizing and collective bargaining. Yet, these rules are arguably outmatched by the anti-labor facets of federal labor law and the utterly inadequate enforcement authority of the NLRB. The statutory imbalance is exacerbated by the Reagan NLRB, the most extreme of all the Boards since the Board's administrative machinery was essentially completed in 1947. To be sure, there have been previous political shifts. During the 1950s, the pro-management Eisenhower Board generated considerable protest and reversals from a Supreme Court shaped by Presidents Roosevelt and Truman.<sup>52</sup> The NLRB eventually appointed by President Kennedy was accused by management as stacked in labor's favor.<sup>53</sup> Conservatives are correct when they point out that the Reagan Board represents another swing of the pendulum for an inherently political institution which, through incremental annual changes in composition, grows to resemble the labor policies of the administration which

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<sup>43</sup> National Industrial Recovery Act, Pub. L. No. 67, 48 Stat. 195 (1933).

<sup>44</sup> 29 U.S.C. §§ 101, 102, 104 to -110, 113 (1982 and Supp. III 1985).

<sup>45</sup> *Id.* at § 103 (1982).

<sup>46</sup> *Id.* at §§ 157, 158(a)(1) (1982).

<sup>47</sup> *Id.* at § 158(a)(2) (1982).

<sup>48</sup> *Id.* at § 158(a)(3) (1982).

<sup>49</sup> *Id.* at § 158(a)(5) (1982).

<sup>50</sup> *Id.* at § 159(a) (1982).

<sup>51</sup> *Id.* at §§ 158, 159 (1982).

<sup>52</sup> Sher, *Regulating Agency Control Through Appointment: The Case of the Eisenhower Administration and the NLRB*, 23 J. OF POL. 667 (1961).

<sup>53</sup> See, e.g., K. McGUINNESS, *THE NEW FRONTIER NLRB* (1963).

appoints it. Conservatives err, however, in denying the unprecedentedly radical swing taken by the Reagan NLRB. That case has been proven beyond cavil.<sup>54</sup>

Federal labor law thus contains enough traps for labor that an ideologically attuned, pro-management NLRB can use that law very potently. But the law is a two-edged sword, even as now written. The risk inherent in Mr. Trumka's prescription is that in the event there is an upsurge of interest in unionism after deregulation, and a government that believes in the purposes of the Wagner Act, the very same processes and laws which now hinder labor's efforts could form an indispensable basis to protect labor's rights, warts and all.

Indeed, in 1984, Mr. Trumka advocated labor law reform as an alternative to deregulation in order to end the NLRA's "delay ridden procedures, token sanctions, and contorted perception of employee rights,"<sup>55</sup> recommending:

- (1) A labor law that requires employers to [r]ecognize a union upon the demonstration that a majority of workers have signed union authorization cards; (2) a labor law that prohibits the hiring of permanent strike replacements; (3) a labor law that reinstates workers pending resolution of unfair labor practices; (4) a labor law that provides effective monetary sanctions for an employer's failure to engage in good faith bargaining; (5) a labor law that conforms with today's corporate realities, including a broad definition of "employer" status; (6) a labor law that prohibits a successor from evading workers and the union at a newly sold operation; and (7) a labor law that provides a private right of action for workers and unions.<sup>56</sup>

Many other salutary improvements can be suggested: legalization of the secondary boycott, elimination of purpose tests for picketing and strikes, introduction of strict timetables for NLRB investigation and adjudication of representational issues and unfair labor practice charges, recognition of the extent of union organization as an appropriate bargaining unit, and debarment of recidivist labor law violators from federal contracts.

Other necessary changes require only aggressive enforcement of the current laws. For example, independent contractors and consultants who advocate or carry out labor lawbreaking on management's behalf have proliferated over the past twenty years. The NLRB should apply its remedial authority to reach directly

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<sup>54</sup> Among the analyses are Modjeska, *The Reagan NLRB, Phase I*, 46 OHIO ST. L. J. 95 (1985); THE FAILURE OF LABOR LAW, *supra* note 33; AFL-CIO LAWYERS COORDINATING COMMITTEE, THE DOTSON BOARD'S DECISIONS 1983-1985 (1985).

<sup>55</sup> *Oversight Hearings on the Subject "Has Labor Law Failed" Part I: Joint Hearings Before the House Subcomm. on Labor-Management Relations of the Comm. on Education and Labor and the Manpower and Housing Subcomm. of the Comm. on Government Operations*, 98th Cong., 2d Sess. 11 (1984).

<sup>56</sup> *Id.*

employer representatives who counsel or commit unfair labor practices.<sup>57</sup> The Landrum-Griffin Act also sets forth extensive reporting and disclosure requirements for such consultants, although the Labor Department's enforcement of them historically has been dismal.<sup>58</sup>

These reforms comprise an ambitious agenda. They affirm the need of a national, preemptive legal regime and of an administrative body structured to enforce the laws swiftly and certainly. Even so, no legal scheme can substitute for a vigorous labor movement committed to organizing the unorganized. Implicit in Mr. Trumka's prescription is that, with federal protections gone and the wolf at the door, labor will of necessity focus on its remaining options, namely, political action and the exercise of raw power in the workplace. But it is just as likely that miners and other workers will engage in a resurgence of organizing if they have no feasible alternative, regardless of the technical legal rules that govern labor-management conflict. Despite labor's recent setbacks, an economy shifting to a massive low-wage sector, with real wages stagnant year after year, saddled by trillions of dollars of national debt, sapped by sharply increasing trade deficits, and suffering chronically high unemployment, will not forever sustain an acquiescent work force. I fully expect that in the next few years there will be a resurgence of unionism and a political climate which favors it.

What to do about labor law is a deeply perplexing question. Even if desirable, deregulation is extremely unlikely. Reform, although stymied—barely—in 1978, must remain at the top of labor's agenda. This is not a very palatable view because the legislative prospects are so uncertain. But the federal labor law's core protections and national administrative framework remain labor's best hope on the legal front. They should be preserved. Labor, in concert with other sympathetic forces, must set upon the task of securing the rewriting, if not the repeal, of federal labor law.

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<sup>57</sup> See Bethel, *Profiting From Unfair Labor Practices: A Proposal To Regulate Management Representatives*, 79 NW. U.L. REV. 506 (1984); Note, *The Liability of Labor Relations Consultants For Advising Unfair-Labor Practices*, 97 HARV. L. REV. 529 (1983); Bernstein, *Union-Busting: From Benign Neglect to Malignant Growth*, 14 U.C.D. L. REV. 1 (1980).

<sup>58</sup> See HOUSE SUBCOMM. ON LABOR-MANAGEMENT RELATIONS OF THE COMM. ON EDUCATION AND LABOR, *THE FORGOTTEN LAW—DISCLOSURE OF CONSULTANT AND EMPLOYER ACTIVITY UNDER THE LMRDA*, 98th Cong., 2d Sess. (1984); Bernstein, *supra* note 57, at 32-41. The reporting and disclosure requirements are codified at 29 U.S.C. §§ 433, 434 (1982).

